COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Rulemaking Establishing the Procedures to be Followed in Electric Industry Restructuring by Electric Companies Subject to G.L. c.164	)	DPU/DTE - 96-100

COMMENTS OF COMPETITIVE SUPPLIERS REGARDING THE PROCEDURES TO BE FOLLOWED IN ELECTRIC INDUSTRY RESTRUCTURING

I. Introduction.

In response to the Department of Telecommunication and Energy's ("Department") solicitation of comments and accepting the invitation to submit joint comments, a group of Competitive Suppliers ("Suppliers") hereby submits comments in the above referenced proceeding, regarding implementation of the terms of chapter 164 of the Acts of 1997 ("Act"). The suppliers group consists of EnergyEXPRESS, Select Energy, PG&E Energy Services, Green Mountain Energy Resources, TelEnergy, WEPCo, AllEnergy, Xenergy, Enron Energy Services and New Energy Ventures.

This initial response has been prepared to comply with the demanding deadlines necessary to open the market by March 1, 1998. Additional issues may arise in the months ahead. Moreover, the roles of various market participants will become more correctly defined in the evolving and complex transition process. Accordingly, the Suppliers believe that these proposed regulations, incorporating comments from various parties, should be promulgated as emergency regulations pursuant to G.L. c.30A §2,

subject to review and amendment as the competitive electricity industry develops. Suppliers also note that emergency regulations lapse unless a hearing is conducted within three months. We believe that a full hearing on these proposed regulations is necessary to comply with the Administrative Procedures Act and to adequately address the issues raised by the various parties.

In addition, it became clear in conversations among suppliers regarding these proposed regulations that the roles and responsibilities of various participants in the new power market (with respect to forecasting, communications, settlement, etc.), both now and when the ISO New England ("ISO") is up and running, are not entirely clear or well understood. The suppliers believe that the Department should convene a technical session to clarify participants' roles in these processes before the market opens and before these rules are finalized.

The Suppliers have identified several issues contained within the proposed regulations which, left unchanged, would severely impede the development of a competitive market. These fall into three general categories: 1) confidentiality of proprietary information; 2) contents of the disclosure label; and 3) use of the disclosure label in advertising. Key issues in each of these categories include the following:

- Confidentiality of proprietary information
    - The terms of service for competitive products can not be available to any person upon request, because they contain confidential, customer-specific price and contract information.

- Proprietary information to be contained in the supplier licensing application such as documentation of purchased power contracts, documentation of financial capability, and sample bill formats must be treated as confidential by the Department.

- Contents of the disclosure label
  - Suppliers must be allowed to use product-specific (vs. portfolio-based) resource and emissions information on their disclosure labels in order to effectively differentiate their products based on environmental characteristics.
  - Because quarterly updates of label information would provide little value to customers and be overly burdensome, disclosure labels should instead be updated annually or upon substantial changes in a supplier's resource portfolio.
- Use of the disclosure label in print advertising
  - Requiring a disclosure label in all print advertising and marketing materials is unnecessary, overly broad, and may well exceed the intent of the Act.

In addition to these and other important issues which fall into the above categories, we have also noted issues where the Department should clarify its position or proced**********

**********low the sequence of the proposed regulations. We have attached a red-lined version of the proposed regulations, including language for many of the changes we propose. However, we have not provided specific language in our redlined version of the proposed regulations regarding hourly settlement or product based environmental disclosure.

II. Definitions Proposed by the Department Require Clarification.

A. Bill

The proposed definition of Bill requires information to be provided based on the billing period identified in the distribution company's tariff. The Suppliers believe that such a restriction would prevent innovative billing practices (i.e., quarterly billing) designed to save money. We recommend that reference to the distribution company tariff be deleted.

A. Competitive Supplier

The proposed definition of Competitive Supplier requires a Competitive Supplier to have or take title to electricity. Suppliers may not take title to electricity in every transaction in which they participate. We recommend the deletion of language referencing the taking of title to electricity and further recommend the insertion of language permitting any entity that supplies generation service to be considered a supplier.

B. Alternative Energy Producer The Department uses this term several times throughout the proposed regulations without providing a definition. We recommend that the term be defined.

I. Distribution Company Requirements Should Contemplate the New Relationships of a Competitive Market.

A. Guarantee of Low Income Payments

The Department proposes a mechanism for guaranteed payment by the distribution company to Competitive Suppliers for generation service provided to low-income customers in the event of non payment. 220 CMR 11.04(5)(e). The proposed mechanism does not specify how a distribution company shall be notified of non payment by low-income customers if such customers receive a bill from the Competitive Supplier pursuant to the passthrough billing option. This issue requires further consideration and should be decided after distribution companies and suppliers working with the Department devise practical procedures.

B. Average Monthly Market Price

The proposed regulations require the determination of price to be based on the "average market price" for the purpose of payment of credits for net metering and "average monthly market price" for default generation service. 220 CMR 11.04(7)(d) and (9)(c). Neither term is defined in the proposed regulations. Suppliers recommend that distribution companies be required to clearly define these prices in their terms and conditions filings with the Department.

C. Default Generation Service Inserts

The Act entitles the default service provider to furnish a one-page insert to accompany the ratepayer's bill (Section 193, subsection 1B(d)). However, the departments proposed regulations do not acknowledge this. The Suppliers recommend that 220 CMR 11.04(9)(c)3 be modified as follows:

Procurement. Each Distribution Company shall procure electricity for Default Generation Service through competitive bidding, subject to review by the Department. The provider of said Default Generation Service shall be entitled to furnish a one-page insert accompanying the ratepayer's bill.

IV. Licensing Regulations Should Not Require the Disclosure of Confidential, Proprietary or

Competitive Information.

A. The Department proposes that before initiating service to Retail Customers, Competitive Suppliers apply for a license and file specific information with the Department. Among the items to be filed for review are:

> "11. Documentation regarding any valid purchased power contract between the Applicant, its affiliates, its parent or subsidiary and any electric company formed pursuant to G.L. 164..."
>
> "13. Documentation of the financial capability (such as the level of capitalization or corporate parent backing) to provide proposed services..."
>
> "16. A sample bill from those Competitive Suppliers that plan to bill Retail Customers in accordance with the passthrough billing option, as set forth in 220 CMR 11.04 (10)(c)... through 220 CMR 11.05(2)."

Suppliers are opposed to the inclusion of 220 CMR 11.05(2)(b)16, which requires the provision of a sample bill in the application for a Competitive Supplier License. Sample bills are not required to be filed pursuant to the Act , and the minimum content requirements for bills are provided for in 220 CMR 11.05. The information provided on bills will be directly related to the multitude of competitive products being offered in the marketplace. Requiring the submission of sample bills for each product should flood the Department with a constant stream of bill amendments as product offerings change. The supplier group recommends that this section either be eliminated altogether or that it be amended to require only one (1) sample bill demonstrating the suppliers' familiarity with the requirements of 220 CMR 11.05. Further the regulations should provide for such information to be treated as confidential pursuant to G.L. c.25 §5D. Otherwise the licensing procedure would effectively publish confidential, proprietary and competitive information of Competitive Suppliers may stifle the development of a competitive marketplace. Moreover the regulations should recognize that the information paid be

submitted for informational purposes only and not for prior approval of the Department.[1]

B. The proposed rules require the payment of $100.00 as an application fee. 220 CMR 11.05(2)(c). The Suppliers recommend that the language be amended to clarify that the $100.00 filing fee be a one-time fee.

C. The Department is empowered to review and approve all license applications. 220 CMR 11.05(2)(d). The Suppliers recommend that the section should be amended to provide that whenever the department rejects a Competitive Supplier's License application, the Department would be required to indicate why the application was rejected.

[1] We believe that the Department must recognize and provide protection from dissemination of any proprietary or competitive material and information. Suppliers believe that any information provided to the Department that may be competitive in nature should be treated as confidential pursuant to G. L. c.25 S 5D.

V. Proposed Billing Requirements Should Not Be More Restrictive Than the Act Requires.

The Department's proposal provides that "[e]ach bill issued by a Competitive Supplier to a retail customer shall include separate lines for (i) electricity consumption, generation price (rate per kilowatt hour), generation cost (total dollar amount owed), and (ii) transmission price and transmission cost, when applicable" unnecessarily regulate suppliers. 220 CMR 11.05(3)(a) can be interpreted to require the unbundling of transmission and generation rates of Competitive Suppliers that choose to contract for power requiring transmission to Massachusetts. Suppliers interpret the language to require delineation of transmission and generation rates only when a Competitive Supplier offers an unbundled price. Otherwise, Suppliers should be free to include all costs in a single, delivered price for generation service.

The section also suggests the presentation of price in a format that customers may not desire and Competitive Suppliers may choose not to use. Competitive suppliers need the opportunity to respond to consumers' preferences for billing formats which differ from the traditional per kilowatt-hour pricing methodology. Other billing methods include a flat fee per month, a fee per room or per light pole. Accordingly, the reference to kilowatt-hour should be stricken from the proposed regulations so that innovative pricing formats may develop as the market does.

Finally, the section requires the printing of billing elements on separate lines of the bill. It is appropriate to include a calculation of the bill using the billing elements on the bill, however, the Suppliers should not be required to print the elements of billing units, the rate per unit and total

price on separate lines of the customer's bill.

VI. An Easily Separable Document Should Qualify as a Letter of Authorization.

The Department proposes that letters of authorization evidencing a customer's affirmative choice to switch electricity suppliers be "a separate document whose sole purpose is to authorize (i) a Competitive Supplier to initiate Generation Service..." 220 CMR 11.05(4)(c)1. In contrast, the Act permits a letter of authorization to be "(i) a separate document, an easily separable document containing only the authorizing language...to initiate… a…supplier change" 1997 Mass Acts. c.164 §193. The use of the phrase "an easily separable document" by the legislature recognizes that the letter of authorization could be a tear-off document included with marketing or other materials. The requirement that the letter of authorization be a separate document would significantly inhibit the marketing ability of Competitive Suppliers and would increase customer acquisition costs thereby inhibiting competition. The provisions should be revised to expressly provide for the letter of authorization to be provided to the customer as a part of marketing materials.

I. Security Deposit Regulations for Commercial and Industrial Customers Should Not Be Adopted.

The Department's proposal that Competitive Suppliers be "precluded from requiring security deposits from Retail Customers except as provided in 220 CMR 26.00 et. seq." should not be adopted. 220 CMR 11.05(6). The proposed language goes beyond the scope of the legislation and will inhibit rather than help implement the intent and will of the legislature. The relevant section of the Act authorizes and directs the Department to make specific existing rules, 220 CMR §§25, 27, 28 and 29, applicable to Competitive Suppliers. The legislature did not

include 220 CMR 26.00 et. seq. in this list. The legislature did not, therefore, make 220 CMR §26.00 et seq. applicable to Competitive Suppliers. Further, the inclusion of these proposed regulations will inhibit product development and offerings to commercial and industrial customers with poor credit histories.

I. The Environmental Components of the Disclosure Label Should Be Product-Based Rather than Portfolio-Based and Should Not Extend Any Further Than The Act Requires.

A. Portfolio Based Disclosure

The proposed regulations require Load serving Entities to prepare information on a label for each price offering 220 CMR 11.06 (2)(a) (emphasis added). This proposed regulation does not conform with the stated purpose of the provision, namely to ensure that consumers are "presented with consistent, accurate and meaningful information...". 220 CMR 11.06(1)(a).

The information to be presented regarding fuel source and emissions is not based on the individual price offering but on the full portfolio of the Load serving Entity. Such proposed portfolio disclosure regulations will not provide customers with meaningful information from which to make informed decisions about their electricity purchases. A portfolio based label will not indicate to the consumer the implications of their purchase of a specific product with respect to resource or emissions characteristics. It will only indicate what is in the supplier's entire portfolio. The proposed regulations will also inhibit suppliers from experimenting with differentiated or innovative products from new sources (i.e., green sources), to turn this will discourage the development of a vibrant renewable energy market in Massachusetts.

The proposed regulations will discourage Competitive Suppliers from testing market acceptance of various products because of market confusion caused by a portfolio based label and the additional cost necessary to properly inform customers. Consumers would be better served by a label that discloses the price, fuel and emissions characteristics of the products they purchase. Accordingly, the regulations should allow product based disclosure labels with respect to the environmental characteristics[2].

The proposed disclosure regulations should also recognize that NEPOOL participants may be Competitive Suppliers and may serve others with various wholesale products. The regulations should allow all Competitive Suppliers to differentiate their resource portfolios from the portfolios of a NEPOOL participant with which they have a contractual arrangement. Each Competitive Supplier will have a different resource mix and should be

permitted**********

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[2] While the proposed regulations do not contemplate the inclusion of a contract term on the disclosure label, the Department attaches the proposed Division of Energy Resources label which does include a line for the contract term, as Attachment B and invites comment. The Suppliers recommend that contract term information while appropriate for terms of service documents, should not be included on the label. Inclusion of such information on a label will likely cause customer confusion, because the price disclosure will be based on historical data from a specified period of time different from that of the contract period disclosed . Such a disclosure would require contract specific labels which would be extremely costly to produce and update and will ultimately be borne by consumers.

**********y the Act, and that it is too large. Many suppliers were not part of the discussions that resulted in the attached label. We suggest that a discussion about size, form and content of a disclosure label be among the topics considered during a Department-convened technical session.

1. The proposed regulations permit the Department to suspend, revoke or terminate the license of a Competitive Supplier for dissemination of inaccurate information or failure to comply with disclosure regulations. 220 CMR 11.06(7). Suppliers believe that no action should be taken against a Competitive Supplier until notice of an alleged violation has been provided along with an opportunity to respond and the Department has made a determination that a violation has occurred.

B. Price Information.

The proposed regulations require disclosure of prices for both time of use and seasonal prices to be based on load profiles for each customer class in New England. 220 CMR 11.06(2)(b) 1(b). The proposed regulations do not indicate who will calculate the customer class load profiles or when the Suppliers will receive such information. The Suppliers suggest that a more meaningful disclosure would include average price based on Load Profiles of customer classes in Massachusetts developed by the Division of Energy Resources.

The proposed regulations also require that the price disclosed for variable price products be shown as the average prices that would have been changed in the last month of the prior quarter. 220 CMR 11.06(2)(b)1C. In the early stages of competition, while historical data may not be available, a snapshot view of variable price products is acceptable. However, as the market matures, average price information for service based on variable prices should be calculated over the course of a one-year period rather than a one-month period, to reflect normal seasonal and market fluctuations and allow reasonable comparison to other products.

C. Hourly Settlements

Under the proposed regulations, data about the characteristics of Known Resources must be based on hourly settlements with the ISO. This approach to tracking is expensive and burdensome and is not justified by any incremental accuracy in the data produced. Moreover, it is not clear that the ISO currently has the capacity to accurately track all of the information expected of it. Finally, the requirement for hourly settlements unnecessarily and unreasonably restricts the ability of suppliers to develop environmentally preferable products (to manage their resource portfolios) and bring them to market at a reasonable price. The suppliers suggest that use of data on net purchases and sales of generation from known resources for some reasonable, extended period of time (“ to the extent traceable by auditable contract trail”) should be allowed to compute the characteristics of Known Resources reflected on the label. This approach is consistent with conclusions drawn in other forums.

D. Quarterly Updates to Labels.

The proposed regulations would require quarterly updated disclosure labels be sent to customers with bills quarterly. 220 CMR 11.06(4)(b). Sending updates quarterly would be burdensome and costly for Load Serving Entities and would be of little value to customers. Instead of this overly burdensome procedure the regulations should provide for a disclosure label to be provided before a customer is enrolled and then updated annually thereafter.

Under the terms of the proposed regulations resource portfolio information would have to be updated quarterly. 220 CMR 11.06(2)(b)2d1(a). Recalculation and updates of resource portfolios would be costly and would be unlikely to reveal significant differences in a portfolio from quarter to quarter. The Suppliers recommend that such information be updated annually or upon a substantial[3] net change in resource mix or emissions from Known Resources.

E. Labor Characteristics.

The proposed regulations would require Load Serving Entities to report on the labor characteristics of their resource portfolios by determining whether a majority of employees at each known generation plant are employed under collective bargaining agreement. 220 CMR 11.06(2)(b) 2d4. This is inconsistent with the requirements of the Act.

The Act does not require plant specific information about labor characteristics.

[3] The issue of what percentage of net change would qualify as substantial should be further explored and finally determined during the period prior to the finalization of emergency regulations.

Rather it only requires Competitive Suppliers or generation companies to report whether they operate under collective bargaining agreements or whether they operate with employees hired as replacement workers during a labor dispute. 1997 Mass Acts c.164 §193 (Inserting M.G.L. c.164 §1F(6). Accordingly, the information label should only include company specific information with respect to labor characteristics[4].

[4] The regulations require Load Serving Entities using system power to disclose labor characteristics "based on the New England region system average in the most recent calendar year available". 11.06(2)(c)4(6). It is unclear who is responsible for determining the system average labor characteristics or what should be reported if such information is unavailable.

F. "Monthly" Billing.

The proposed regulations assume that billing will be done monthly. 220 CMR 11.06(4)(b). The Suppliers suggest that the word "monthly" be stricken from the title of this subsection because billing may not be done on a monthly basis for every product.

IX. Competitive Supplier Terms of Service Should Not be Available to Non-Customers.

The proposed regulations require a Competitive Supplier to make the label and terms of service available to any person upon request. 220 CMR 11.06(4)(c). The terms of service contain information specific to a contract between the Competitive Supplier and a customer. The contractual terms and any offers made are at the discretion of the Competitive Supplier and are typically time sensitive. Such information is competitive in nature and should not be available to anyone other than the customer upon request. Certainly, customers should have access to the terms of service information for any products offered to them, but others should not be entitled to the information.

X. A Disclosure Label Should Not Be Required in Advertising.[5]

Requiring a disclosure label in all print advertising and marketing materials is unnecessary, overly burdensome, and could have unintended consequences. The requirements as proposed may also exceed the intent of the legislature.

In addition to requiring a 6" x 8" disclosure label, the proposed regulations would require that:

5Green Mountain Energy Resources does not join in the suppliers' comments on this issue. See comments filed by GMER as part of the Renewable Energy Alliance.

> A Competitive Supplier shall print the disclosure label prepared pursuant to 220 CMR 11.06(6) in a prominent position in all written marketing materials describing generation service, including newspaper, magazine, and other written advertisements; direct mail materials; and electronically-published advertising including Internet materials. Where Electricity Service is marketed in non-print media, the marketing materials shall indicate that the customer may obtain the disclosure label upon request. 220 CMR 11.06(6)(b)

These proposed requirements exceed the explicit requirements of the Act. The Act provides only that "[a] supplier, generation company, or aggregator shall be allowed [emphasis added]" to advertise the environmental and labor characteristics of its products, subject to rules and regulations promulgated by the Department. 1997 Mass. Acts C. 164 S 193(inserting a new section 1F to G.L. c.164) It is neither required that all advertising include a label, nor that the regulation of environmental and labor-specific claims in advertising be in the form of a label.

Requiring a disclosure label in all advertising and direct marketing materials would be costly, burdensome, and overly broad. The Boston Globe, for example, charges more than $9000 per day for a quarter page ad - something only slightly larger than the sample 6" x 8" label that the Department included with its proposed regulations. Requiring a disclosure label in printed marketing materials would be overly burdensome. Periodic updates of the label would require the redesign, reprinting, and redistribution of marketing materials, resulting in needless expense.

The proposed regulations are overly broad, because they would apply to all forms of marketing materials, including those not specifically directed at Massachusetts customers (e.g. those used in national or regional advertising campaigns).

The Suppliers believe the Act is designed to protect customers from misleading claims, and to allow customers access to the information they want or need to make informed product choices. The Suppliers fully support such a position. However, the Department's proposed

regulations provide these protections elsewhere. Section 11.06(6)(d) allows a supplier to advertise the percentage of its resource portfolio that is environmentally preferable only where that percentage is derived from Known Resources and the percentage exceeds what is required by regulation. The proposed regulations also require suppliers to provide labels to customers prior to the initiation of service, in subsequent annual booklets, and upon request.

XI. Conclusion

The suppliers commend the Department on the efforts made to prepare for the beginning of competition. We believe that great strides have been made to meet the Retail Access Date of March 1, 1998. The development of a vibrant, competitive market will be of great benefit to consumers as prices decline and new products and services are developed. We urge the Department to consider these benefits as the proposed regulations are finalized. Overly restrictive regulations will effectively prevent the development of a competitive market in Massachusetts.

The process through which the regulations are finalized must be dynamic so that the regulations will evolve to meet consumer demands and the needs of a changing marketplace. We again urge the Department to convene a technical session to further explore general market issues as well as the specific issues of: 1) confidentiality of proprietary

information; 2) contents of the disclosure label; and 3) use of the disclosure label in advertising.

Respectfully submitted,

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